IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2386 OF 2006

Siemens Information System Ltd.)
130, Pandurang Budhkar Marg, Worli,)
MUMBAI - 400 018.)..Petitioner.

V/s.

1) The Assistant Commissioner of)
Income-tax 7(2), Room No.624,)
6th Floor, Aayakar Bhavan, M.K.)
Marg, Mumbai - 400 020.)
)
2) Commissioner of Income Tax-7,)
Room No.611, 6th Floor, Aayakar)
Bhavan, M.K. Marg,)
Mumbai - 400 020)
)
3) Union of India, through the)
Secretary, Ministry of Finance,)
North Block, New Delhi - 110 001.)..Respondents.

Mr.P.J.Pardiwala with Mr.Atul Jasani for petitioner.

Mr.Ashok Kotangale with S.R.Chauhan and A.D. Nagarjun for respondents.

CORAM : F.I.REBELLO AND R.V.MORE, JJ.

JUDGMENT RESERVED ON : 4TH JULY, 2007.

JUDGMENT DELIVERED ON : 11TH OCTOBER, 2007.

JUDGMENT (PER F.I.REBELLO, J)

1. Rule. By consent, heard forthwith.

2. The Assistant Commissioner of Income-tax 7(2), Mumbai sought to reassess the petitioner in respect of its income for the assessment year 2001-02

under section 147 of the I.T. Act. By this petition, the petitioner challenges the notice issued under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3. In order to correctly appreciate the issue, a few relevant facts may be noted as under:-

During the previous year relevant to assessment year 2001-02, the petitioner had set up undertakings in Software Technology Parks situated at Bangalore, Delhi, Chennai, Calcutta, Pune and Khargar, the profits whereof were eligible for deduction under section 10-A of the Act. The petitioner had also a 100% Export Oriented Unit situated at Mumbai whose profits were eligible for a deduction under Section 10-B of the Act. They also had units at other locations whose profits were not eligible for any deduction either in terms of Chapter III of the Act or in terms Chapter VI-A of the Act. The petitioner had filed its return of income for the assessment year 2001-02 on 31st October, 2001 in which return it had claimed a deduction under section 10-A in respect of the profits derived from the various undertakings set up in Software Technology Park as also deduction under section 10-B. The petitioner computed its income chargeable under the head of "profits and gains of

business or profession" before claiming such deductions at Rs.41,62,40,653/- and in accordance with the methodology prescribed in the form of the return of income deduction under section 10-A and 10-B and claimed Rs.51,12,99,843/- and the loss that was suffered by the petitioner in respect of the operations of its other units aggregating Rs.9,50,59,190/- was sought to be carried forward to a subsequent years.

4. The respondent No.1 had, in the course of the assessment proceedings, raised a specific query as to the methodology of computing the deduction under sections 10-A and 10-B and as to why the losses of the units whose profits were not eligible for deduction under section 10-A and under section 10-B should not be set off against the profits of the units which were eligible for a deduction. The petitioner’s representative had made submissions in the course of the hearing and had further clarified the issue by a letter dated 24th February, 2004. Further queries raised by the respondent No.1 in connection with the claim for deduction under sections 10-A and 10-B, were also replied to under cover of a letter dated 24th February, 2004. It is the further case of the petitioner that at a hearing which took place on 24th February, 2004 the respondent No.1 sought further clarifications in connection with the aforesaid issues.

The petitioner in response submitted a detailed explanation under the cover of the petitioner's letter dated 4th March, 2004. The respondent No.1 after applying his mind to various issues raised in the course of the assessment proceedings for the assessment year 2001-02, on 23rd March, 2004 by an order passed under section 143(3) of the Act, allowed deductions under section 10-A to the extent of Rs.48,13,07,102/-. In respect of various issues that were raised in the course of the assessment proceedings in connection with the claim for deductions under section 10-A and 10-B, the assessing officer accepted the contention of the petitioner that the methodology that were adopted in claiming the deductions were correct. Where the respondent No.1 disagreed with the contentions put forth by the petitioner, the respondent No.1 gave a detailed reasons for rejecting the same and accordingly, as against the claim of Rs.51,12,99,843/- restricted the deduction allowable to Rs.48,13,07,102/-. The assessment for the assessment year 2001-2002 was completed by an order dated 23rd March, 2004 passed under section 143(3) of the Act.

Subsequently, the petitioner's assessment for assessment year 2003-04 where the petitioner had made similar claims as made in the earlier assessment years, was completed on 28th February, 2006. The

assessing officer who was different negatived similar claim. The assessing officer took a view that the losses incurred in the units which were not eligible for deduction under sections 10-A and 10-B of the Act have to be first set off the profits of the units which were eligible for a deduction and only the balance profits would be eligible for a deduction under section 10-A.

5. Considering the view taken for the assessment year 2003-2004 the respondent No.1 issued the notice on 13th March, 2006 and in accordance with the requirement of section 148 of the Act, recorded the reasons on the basis of which he had formed the belief that the petitioner's income chargeable to tax had escaped assessment for the A.Y. 2001-2002. These reasons were furnished to the petitioner under the cover of a letter dated 31st May, 2006. It is contended that on a perusal of the reasons given the substance of the reasoning reveals that the belief that the income has escaped assessment has been formed on the basis of the view taken in the assessment year 2003-04 and further on the basis of a decision of the Bombay Bench of the Tribunal in Navin Bharat Industries V/s. Dy.C.I.T. 80 ITD 1.

The petitioner filed its objections to the

validity of the reassessment proceedings by its letter dated 7th July, 2006 wherein it was inter alia contended that the assessing officer hearing the original assessment proceedings had formed an opinion that the claim of the petitioner was in accordance with the law and having allowed the same, it was not open to a succeeding officer to come to a different conclusion based merely on a change of opinion. It was also pointed out that there could be no valid belief that the income chargeable to tax has escaped assessment inasmuch as the deduction of Rs.51,12,99,843/- that was claimed by the petitioner was in accordance with the provisions of sub-section (1) of section 10-A as well as in accordance with the methodology provided for in the form of the return of income. It was pointed out that the decision of the Tribunal on which reliance was placed was completely distinguishable. The petitioner also placed reliance on the Judgment of the Supreme Court in **C.I.T. V/s. Canara Bank Work Shop Pvt. Ltd.** reported in **161 I.T.R. 320** in support of its claim.

6. The respondent No.1 by an order dated 28th August, 2006 disposed of the objections merely by relying on the provisions of section 10-A (6)(i) & (ii). The respondent No.1 further held that the deduction under section 10-A is to be allowed only to the extent of profits available as held in the

assessment year 2003-04. That notice is the subject matter of the present challenge.

7. The respondent No.1 has filed a reply of one Shri N.L.Ravichandra, Assistant Commissioner of Income Tax-7(2). It is set out that the two conditions required to issue notice under section 148 of the Act are fulfilled and as such it was within the jurisdiction of the respondent No.1 to issue notice. The petitioner had not made true and full disclosure of the material facts. Escapement of income is sufficient ground to issue notice under section 148 of the Act. It is contended that whether there is true and full disclosure of the material facts is not relevant in terms of the provisions of the Act. The petitioner, it is contended, has not deducted the losses of non 10A units. The losses of non 10A units are simply carried forward which ought to be substracted from the profits of 10A units. But the petitioner intelligently engineered to carry forward the losses till 10A units completed the tenure of 10 years and thereafter setting off the losses to hide the profits of business. The petitioner, in this manner, has set off losses to the extent of Rs.63 crores in assessment years 2004-05 and 2005-06. The reopening, it is set out, was done within the parameters of law and there was valid reason to believe that income has escaped assessment and that the

notice is not based on mere change of opinion but as there exists a valid reason. In regular assessment if the incone has escaped assessment that does not mean that it cannot be rectified. It is pointed out that this section speaks about total income of the assessee, but the assessee is also speaking about profits and not about the losses of other non 10A units. It is contended that the principles of Navin Bharat Industries Ltd. V/s. DCIT (90 ITD 1) (TM) is clearly and squarely applicable to the facts of the present case. For all the aforesaid reasons, it is set out that the petition has to be dismissed.

8. The contention urged on behalf of the petitioner is that the notice dated 13th March, 2006 issued under section 148 of the Act for the assessment year 2001-02 is without jurisdiction of law inasmuch as, no income has escaped assessment and mere change of opinion is not sufficient and, therefore, the same is liable to be quashed.

9. In support of the petitioner’s contention, learned counsel submits that before proceedings for reassessment can be initiated, certain jurisdictional conditions have to be complied and if the assessee demonstrates that these jurisdictional conditions have not been complied with, the notice issued under section

148 of the Act has to be held to be illegal and must be quashed. One of such jurisdictional condition is that the assessing officer must have reason to believe that an assessee's income chargeable to tax has escaped assessment and secondly that the reason to believe that said escapement occurred by reason of either (a) omision or failure on the part of the assessee to make a return of income under section 139 or (b) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. It is submitted that it is well settled that the expression "reason to believe" does not mean a purely subjective satisfaction on the part of the assessing officer. The reasons must be held in good faith and must have a rational connection with or a relevant bearing on the formation of the belief. It is not any or every material howsoever vague or far fetched which would warrant the formation of the belief relating to escapement of income of the assessee. Reliance is placed on the Judgment of this Court in **Zuari Estates Development and Investments Co. Pvt. Ltd. V/s. J.R. Kanekar, Deputy Commissioner of Income Tax (Assessment) & Anr. reported in 271 I.T.R. 269.** In the said case, this Court held that the belief is to be that of a prudent person and if a Court comes to the conclusion that on the reasons recorded no one properly instructed on the facts and the law could

reasonably entertain the belief, the conclusion would be inescapable that the assessing officer could not have reason to believe that any part of the income of the assessee had escaped assessment. Reliance is also placed on the Judgment of the Full Bench of the Delhi High Court in **Commissioner of Income Tax V/s. Kelvinator India Ltd. 256 I.T.R. 1** as also some other Judgments.

It is also submitted that the deductions under sub-section (1) of section 10-A and sub-section (1) of section 10-B is allowed to the extent of profits derived from the concerned unit. There is no dispute of the quantification of the profits derived from the concerned units. What the assessing officer is seeking to do is to set off the losses incurred in the units that are not eligible for a deduction against the profits that are eligible for a deduction and thereby reduce the deduction that section 10A and 10B mandates to be allowed. The contention of the petitioner however is that the deduction of the profits must be allowed in its enterity without any such set off and the same is in accordance with the clear wording of the section and in accordance with the method prescribed in the form. The form postulates that the deduction is to be allowed in computing the income of each source chargeable under the head "profits and gains of

business or profession". The provision for set off of losses in respect of different sources under the same head and different heads which are contained in sections 70 and 71 come into play only after such computation under the respective heads are made. In support of that reliance is placed on the Judgment in the case of **Commissioner of Income-Tax (Central) Madras V/s. Canara Workshops P. Ltd.** reported in **(1986) 161 I.T.R. 320**. The Supreme Court in that case held that the losses of an undertaking that was eligible for a deduction under section 80E should not be set off against the profits of another undertaking that was also eligible for a deduction under section 80E and the entire profits of the latter undertaking should be eligible for the deduction under section 80E. The ratio in Navin Bharat Industries, it is submitted, is entirely different and all that the Tribunal was considering in that case is whether for the relevant assessment year, a loss incurred in a unit that was eligible for an exemption under section 10A could be set off against the profits from other units which were not eligible for such exemption. The Tribunal held that section 10A was a provision granting a benefit and if an assessee chooses not to avail of benefit for some reason, the benefit could not be foisted on him.

It is, therefore, submitted that no person

properly instructed could ever have formed the belief that the petitioner's income chargeable to tax had escaped assessment.

10. The real issue is whether on the facts of the case, can it be said, that this is a case of mere change of opinion. The assessing officer can assume jurisdiction under section 147 of the Act on any fresh information or change in the legal position or the like. However, can the succeeding assessing officer because such officer holds a view different on the interpretation of the provisions of law, which were considered by the previous assessing officer result in issuing the notice under section 148 of the I.T. Act. In this context, whether on the facts of the case, there was material for the assessing officer for 'reason to believe' that income chargeable to tax has escaped assessment.

To answer the issue, we may consider some of the Judgments cited at the instance of the assessee. In **Parshuram Pottery Works Co. Ltd. V/s. Income Tax Officer, Circle I, Ward A, Rajkot** reported in **(1977) 106 I.T.R. 1**, was a case where the assessing officer relied upon his own records for determining the amount of depreciation allowable to the assessee and made a mistake in doing so. The Supreme Court held that

responsibility for that mistake cannot be ascribed to an omission or failure on the part of the assessee. The Court noted that the word "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year" postulates a duty on the assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. Quoting the Judgment in Calcutta Discount Co. V/s. Income Tax Officer [1961] 41 ITR 191, 201 (S.C.), the Court observed that once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inference of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences, whether on facts on law, should be drawn.

In **Commissioner of Income-Tax V/s. Kelvinator of India Ltd.** reported in **(2002) 256 I.T.R. 1**, the Full Bench of the Delhi High Court was considering section 147 of the I.T. Act as amended. The question for consideration was whether on a mere change of opinion by the Income Tax Officer, action under section 147 of the I.T. Act can be brought into

operation. The Court noted the section as it stood before the amendment. The requirement of the old provision that the Income Tax Officer should have reasons to believe or information in possession before taking action to assess or reassess the income escaping assessment has been dispensed with. The other simplified provisions brought by substitution of section 147 by the Amended Act were set out. Pursuant to the amendment, the expression "reason to believe" was reintroduced which was earlier dropped and had been substituted by the expression "opinion". The Court held that the power to assess or reassess is much wider under the amended provision and can be exercised even after the assessee had disclosed fully and truly all the materials facts. The Court also noted that the Board has power to issue circulars under section 119 of the Act and these circulars which are issued are legally binding on the revenue. Quoting the circular, the Court held that even according to the Central Board of Direct Taxes, mere change of opinion cannot form the basis for reopening a completed assessment. The Court held that on a perusal of the provisions contained in section 147 of the Act as it stood upto March 31, 1989, it was evident, that to confer jurisdiction under section 147(a) of the Act, two conditions were required to be satisfied viz. (1) the assessing officer must have reason to believe that income chargeable to tax

has escaped assessment; and (2) he must also have a reason to believe that such escapement occurred by reason of either; (a) omission or failure on the part of the assessee to make a return of his income under section 139 or (b) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. The Full Bench held that what would constitute "reason to believe" is no longer res-integra. Reference was made to the Judgment of the Supreme Court in Calcutta Discound Co. Ltd. (1961) 41 ITR 191 wherein the Supreme Court held that once the primary facts are before the assessing authority he requires no further assistance by way of disclosure. In Indian and Eastern Newspaper V/s. C.I.T. [1979] 119 ITR 996 (SC) that ‘opinion of law’ would not be new information. This Judgment was followed in **KLM Royal Dutch Airlines V/s. Assistant Director of Income Tax** in W.P.(C) 16574-75 of 2006 and 16576-77/ 2006 dated 12th January, 2007. The learned counsel for the revenue had drawn our attention to the Judgment in the case of **Consolidated Photo & Finvest Ltd. V/s. Assistant Commissioner of Income-tax** reported in **(2006) 151 Taxman 41 (Delhi)**. In KLM Royal Dutch Airlines (supra) the Delhi High Court considering the view taken by the Full Bench in Kelvinator of India Ltd. (supra) held that it does not lay down the correct law. In Consolidated Photo &

Finvest Ltd. (supra) the Delhi High Court had held that the principle that a mere change of opinion cannot be the basis for re-opening the completed assessment would have no application where order of assessment does not address itself to aspect which is basis for reopening of assessment.

11. When a challenge is made to a notice under section 148 of the Act, what the Court is required to examine is whether material exists on record for the assessing officer to form the requisite belief. Mere change of opinion cannot form the basis of reopening a completed assessment.

In Zuari Estate Development and Investment Co. Pvt. Ltd. (supra), this Court held that the belief entertained by the Income-tax Officer must not be arbitrary or irrational. It must be reasonable or in other words, it must be based on reasons which are relevant and material.

In **German Remedies Ltd. V/s. Deputy Commissioner of Income Tax & Ors.** reported in **(2006) 285 I.T.R. 26 (Bom.)**, this Court held that the belief that the income had escaped assessment entertained by the assessing officer must be a prudent belief and not mere change of opinion. In that case, the Court found

that the assessment was sought to be reopened merely on suspicion that the assessee might have utilised the borrowed funds for investment and that the assessee must have incurred expenditure for earning the dividend income. The Court held that there is no reason to believe that the income had escaped assessment and the reasons entertained by the assessing officer is wholly based on presumption, conjectures and surmises, which is not permissible in law.

On the other hand, on behalf of the revenue, reliance is placed on the Judgment in the case of **Anusandhan Investments Ltd. V/s. M.R.Singh, Deputy Commissioner of Income-tax & Anr.** reported in **(2006) 287 I.T.R. 482 (Bom.)**. The issue there was the challenge to the notice under section 148 of the Act. Admittedly, the issue regarding the capital gains arising from the sale of shares pursuant to the agreement dated January 3, 1992 was neither raised nor discussed in the assessment order for the assessment year 1992-93. On those facts, the Court refused to intervene in the extra ordinary jurisdiction. Reliance is also placed in the case of **Commissioner of Income Tax V/s. P.V.S. Beedies Pvt. Ltd.** reported in **(1999) 237 I.T.R. 13 (S.C.)**. Notice for reopening of assessment was based on the report of the internal audit party. The Court held that it would be

permissible. Similar was the view taken by the Delhi High Court in the case of **New Light Trading Co. V/s. Commissioner of Income Tax** reported in **(2002) 256 I.T.R. 391**. It is necessary to refer to the Judgment of the Supreme Court in **ESS ESS Kay Engineering Pvt. Ltd. V/s. Commissioner of Income Tax** reported in **247 I.T.R. 818**. In this case fresh material was obtained based on which the Supreme Court held that mere fact that case of the assessee was accepted as correct in original assessment for the assessment year would not preclude the assessing officer to reopen the assessment on the basis of fresh materials obtained in the course of assessment for the next assessment years.

12. The question that we are called upon to answer is whether for a susequent A.Y. another assessment officer holds a different view or opinion then his predecessor as to how the income should be assessed on the interpretation of the provisions on similar material which was disclosed earlier and on the same set of facts, could have ‘reason to believe’ to issue a notice for reassessment. As we have noted the various Judgments, it is open to the assessing officer to issue a notice for reassessment provided there are "reason to believe". In the instant case, the reason to believe as pointed out were firstly based on the purported finding that losses incurred in the units

which were not eligible for deduction under section 10A and 10B had to be first set off against the profits of the units which are eligible for deduction and only the balance profits would be eligible for deduction under section 10A. In so far as this reason is concerned, it clearly establishes that the second assessing officer has disagreed with the approach of the assessing officer who had made the assessment for the assessment year 2001-02 and had accepted the petitioner's method of accounting. It is not the case of the respondents that any material had been suppressed and / or not disclosed and / or new material had come to the attention and / or audit party in the course of audit found that the method followed by the petitioner was illegal or that this Court or the Supreme Court had taken a view on the issue. The second assessing officer on the construction of the provisions was of the opinion that the interpretation of provisions as held by him was the correct view. Can that be said to be a valid reason to believe ?

In Canara Workshops P. Ltd. (supra) considering section 80E of the Act, the assessee had claimed certain reliefs in a particular manner. The assessing officer noted the assessee had not taken into account the losses incurred in the Alloy Steel Industries and the assessee would be entitled to the

deduction under section 80E on the profits of the automobile parts after setting off the losses on Alloy Steel manufacture. The Supreme Court noticing the language of section 80E noted that the distinction must be drawn between the case where the loss or unabsorbed depreciation pertains to the same industry whose profits and gains are the subject of relief under section 80E and a case where the loss or unabsorbed depreciation relates to industries other than the one whose profits constitute the subject of relief. It is no doubt true that our attention was invited to the Judgment of the Karnataka High Court by the revenue in the case of **Commissioner of Income Tax V/s. Himatsingike Siede Ltd.** reported in **(2006) 286 I.T.R. 255 (Karn.)**. That was the case under section 10B. The unit had commenced operations in the previous year relvant to the assessment year 1988-99, but the assessee had not made any claim under section 10B for the first three years. It claimed the benefit of exemption during the assessment year 1992-93. In the assessment year 1994-95 the assessee had income other than the profits a derived from the operations of the E.O.U. and, therefore, sought to set off unabsorbed depreciation for the assessment year 1988-89 against such profits. The claim was accepted by the assessing officer and subsequently, the Commissioner of Income-tax sought to reopen the assessment on the

ground that the brought forward losses of the E.O.U. were sought to be set off against the profits of the E.O.U. Thereby the income of the assessee was reduced to nil. The learned Division Bench had held that section 10B cannot be read in isolation of other provisions. It is only an exemption provision and upheld the order of the revisional authority. The ratio of the said Judgment has no application whatsoever to the question that arise for determination in the present proceedings.

13. In the instant case the second assessing officer for AY 2003-2004 on the same set of facts has taken a view which is different from the view taken by the previous assessing officer for A.Y. 2001-2002, on the interpretation of the same provisions of law. It is possible in the absence of finality to a question of law, that an assessing officer on the same set of facts could take a different view. Would that attract the provisions of section 148 of the I.T. Act because the second assessing officer holds a different view on the interpretation of the provisions. The accounting system is the same. The returns have been filed in the manner prescribed by the form. On these facts because the second assessing officer differs with the opinion of the earlier assessing officer on the interpretation of the provision without any other additional material,

is he entitled to assume jurisdiction to issue a notice under section 148. In our opinion, such a belief would amount to a mere change of opinion. The remedy in case like this would be to invoke or resort to the other applicable provisions of the Act. If the I.T.O. does not possess the power of review, he cannot achieve that object by initiating a proceeding for reassessment or by way of rectification of mistake. A mere change of opinion on an interpretation of a provision by itself without anything more, cannot give rise to 'reason to believe'. The power of re-opening an assessment has been conferred by the Legislature not with the object of enabling the Income Tax Officer to re-open the full declaration made against the revenue in respect of questions raised that arose directly for consideration in the earlier proceedings. If that were not the legal position, it would result in placing an unrestricted powers of review in the hands of the assessing authorities depending on their changing moods.

14. The other reason given for 'reason to believe' was the Judgment in the case of Navin Bharat Industries Ltd. (supra). This case had come up for consideration before us in another case of the present petitioner in Writ Petition No.2384 of 2006 which we have decided on 3rd July, 2007. This is how the Court explained the ratio of the Judgmdent:-

> " On these facts, the learned third member held that a privilege cannot be to a disadvantage and an option cannot become an obligation and if the assessee does not want to avail of the benefit entitled in that respect for some reasons, that benefit cannot be forced upon him. It would be clear that the Judgment is not an authority for the proposition as to whether losses suffered being undisputedly covered by section 10A as it then stood could be set off against profits of other business income of the assessee or vice versa. "

The decision in Navin Bharat Industries Ltd. (supra), therefore, by itself or in conjunction with a change of opinion as to the true construction of a provision, could not also give rise for 'reason to believe'.

15. It will, therefore, be clear that both the reasons cited by the assessing officer to issue notice, either based on the opinion of the Tribunal in Navin Bharat Industries Ltd. (supra) or on his interpretation of the provisions, would be non existing

and / or merely a change of opinion. This would not constitute ‘reasons to believe’.

In these circumstances, the petition will have to be allowed and accordingly Rule is made absolute in terms of prayer clause (a) and (c) of the petition.

(F.I.REBELL0, J.)

(R.V.MORE, J.)